Supreme Court, U. S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1550

LANE PROCESSING, INC.,
Petitioner,

versus

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Charles J. Hlavinka
ATCHLEY, RUSSELL, WALDROP
& HLAVINKA
803 Spruce Street
P. O. Box 1049
Texarkana, Texas 75501

ATTORNEYS FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED 2

THE QUESTION PRESENTED 2

STATUTE INVOLVED 3

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX TO THE PETITION

Judgment of the Eighth Circuit Court's Opinion 1a

Judgment of the Trial Court 2a

Memorandum Opinion 3a

INDEX OF AUTHORITIES

CASES:

Brennan v. City Stores, Inc., (CA5 Ala.) 479 F.2d 235, reh. den. 5

Brennan v. Correa, 513 F.2d 161, 163 (8th Cir. 1975) 6

Goldberg v. Kickapoo Prairie Broadcasting Co., 288 F.2d 778, 782 (1961) 6

Hodson v. American Can Company, (CA8 Ark.) 440 F.2d 916 5

INDEX OF AUTHORITIES (Continued)

Page

Lenroot v. Interstate Bakeries Corp., 146 F.2d 325, 327 (8th Cir. 1945) 6,7

Lenroot v. Kamp, (CA5 Miss.) 153 F.2d 153 5

Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 79 S.Ct. 260 5

Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547, 551 (1952) 6,7

Walling v. Youngerman-Reynolds Hardware Co., Inc., 325 U.S. 419 2,7

STATUTES:

28 U.S.C.A. 1254(1) 2

29 U.S.C. §212(c), 215(a)(4), 217 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

LANE PROCESSING, INC.,
Petitioner,

versus

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on December 5, 1979.

OPINIONS BELOW

The District Court for the Western District of Arkansas, Ft. Smith Division, rendered a judgment and

Memorandum Opinion on March 13, 1979 in favor of Lane Processing, Inc. denying the requested injunction by the Secretary of Labor. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the Trial Court's Order was rendered on December 5, 1979.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 5, 1979 (copy thereof is appended to this Petition at Pages 1a-2a.) The Court's Opinion bearing the same date is appended to this Petition at Pages 3a-12a.

(ii) 28 U.S.C.A. 1254(1) confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

THE QUESTION PRESENTED

Whether a United States Court of Appeals under the Fair Labor Standards Act can abandon the principles found in *Walling v. Youngerman-Reynolds Hardware Co., Inc.* and hold that it is an abuse of discretion for the Trial Judge to deny an injunction when there is an uncontroverted evidence of good faith attempts of past compliance, assurances of future compliances and institution of a complex system to prevent future violations.

STATUTE INVOLVED

The statutory provisions involved are 29 U.S.C. §212(c), 215(a)(4), 217.

STATEMENT OF THE CASE

On June 28, 1976, the Secretary of Labor instituted an action against Lane Processing, Inc., requesting injunctive relief pursuant to §17 of the Fair Labor Standards Act. The Complaint alleged that Lane Processing, Inc. had employed persons under the age of 16 years since June 28, 1974.

Lane Processing, Inc., is engaged in chicken processing operations in Grannis, Arkansas and Broken Bow, Oklahoma. It is conceded that the Petitioner falls within the purview of the Act. Throughout the entire proceedings Lane Processing, Inc. has admitted to unintentional past violations of the Fair Labor Standards Act.

In 1975, a representative of the Labor Department investigated the Grannis and Broken Bow locations of Lane Processing, Inc. At the conclusion of those investigations, and upon discovering violations of the Fair Labor Standards Act, the Labor Department representative instructed representatives of Lane Processing, Inc., that they were to discontinue hiring anyone under the age of sixteen. At that time the Lane Process-

ing, Inc., representatives agreed to follow the instructions of the Labor Department.

As an immediate manifestation of Lane Processing, Inc.'s desire to comply with the requirements of the Fair Labor Standards Act, notices of the requirement of such law were posted for the benefit of the employees of Lane Processing, Inc. and were sent to all supervisors. These notices were posted and circulated among the supervisors and employees for the purpose of making them aware that the law requires each job applicant and each employee to be at least age sixteen. Shortly thereafter, John D. Bassinger was hired by Lane Processing, Inc. and one of his primary duties was to insure compliance with the Fair Labor Standards Act. In order to guarantee that Lane Processing, Inc., was at that time currently complying with the Act, Bassinger went through the employment records of the company and required all employees to present some document (e.g. Birth Certificate, Record of Baptism, School Records, etc.) which would prove the age of the employee. At both plant locations, any employee found to be in violation of the Act was immediately dismissed from further employment. The system instituted required that job applicants would not be hired unless they have such proof of age, and every application is reviewed by Mr. Bassinger to assure that applicants have such proof. Subsequent to the adoption of this system supervisors were not allowed to hire anyone without the knowledge and consent of Mr. Bassinger.

At the conclusion of the evidence the Trial Judge for the United States District Court, Western District of Arkansas, Ft. Smith Division entered an Order denying the requested injunction. Thereafter an appeal was perfected by the Secretary of Labor to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the Judgment of the District Court with directions to grant the injunctive relief.

REASONS FOR GRANTING THE WRIT

The judiciary has uniformly applied the following two prong test in injunction cases (1) Did the alleged violation occur, and (2) Likelihood of future violations. Likewise, in proceedings to enjoin violations of the Fair Labor Standards Act, the Trial Court has broad discretion as to the granting or denial of such relief, which will not be interfered with unless an abuse of such discretion is shown. *Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207, 79 S.Ct. 260; *Lenroot v. Kemp,* (CA5 Miss.) 153 F.2d 153; *Brennan v. City Stores, Inc.,* (CA5 Ala.) 479 F.2d 235, reh. den.; *Hodson v. American Can Company,* (CA8 Ark.) 440 F.2d 916.

Throughout the proceedings, Lane Processing, Inc. has candidly admitted to unintentional past violations. However, a review of the record indicates constant revisions in its employment scheme at the processing plants which have finally led to a sophisticated compliance system requiring each employee to be screened and produce documentation of his or her age.

The Eighth Circuit cites four cases as authority for holding that the Trial Court in the present situation abused its discretion in denying the requested injunction. *Brennan v. Correa*, 513 F.2d 161, 163 (8th Cir. 1975); *Goldberg v. Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778, 782 (1961); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 551 (1952); *Lenroot v. Interstate Bakeries Corp.*, 146 F.2d 325, 327 (8th Cir. 1945). A careful review of these decisions clearly indicates that their holdings are directly in conflict with the present decision by the Eighth Circuit.

(1) *Brennan v. Correa* — This case involved violations of the Child Labor provisions of the Fair Labor Standards Act. The Court stated "the record indicates that Correa instituted no measures sterner than oral directives against his two primary supervisors. This Court concludes that the record provides an insufficient factual basis for a reasonable belief that violations of the Act will cease. The Trial Court's dismissal of the Secretary's Complaint was an abuse of discretion."

(2) *Goldberg v. Kickapoo Prairie Broadcasting Co.* — This case involved violation of the record keeping and compensation provisions under the Fair Labor Standards Act. The Court held that it was an abuse of discretion for the Trial Judge to deny the requested injunction when: "The violations were known to the defendant and yet no corrective measures or other indications of good faith were taken or made."

(3) *Tobin v. Anthony-Williams Mfg. Co.* — This case involved violations of overtime compensation requirements of the Fair Labor Standards Act. The Court held that when: (a) Employer admittedly violated record keeping provisions of the Fair Labor Standards Act and (b) no showing was made to the Federal District Court as to what would be done by employer to bring employer's records into conformity with requirements of the Act and (c) no officer of employer stated that employer would or would not comply and (d) the only showing of intention to comply was a statement made by employer's attorney, then the Federal District Court abused its discretion in refusing to grant the request of the Secretary of Labor for an injunction under the Act.

(4) *Lenroot v. Interstate Bakeries Corp.* — This case involved violations of the Child Labor Provisions of the Fair Labor Standards Act. The Court held: "The proof made constituted cause shown . . . to restrain violation of §15 within the meaning of §17 of the Act in the absence of satisfactory evidence that there had been such change in conditions, personnel or method of employing and keeping a check on operations as to assure discontinuance of the violations in the Kansas City Plant."

This Honorable Court has adopted the same principles in *Walling v. Youngerman-Reynolds Hardware Co., Inc.*, 325 U.S. 419.

In the case at Bar the Eighth Circuit has discarded the second part of the previously stated two prong test by ignoring the uncontroverted good faith efforts on the part of Lane Processing, Inc. to effectively eliminate the violations by the adoption of a complex employment system suggested by Compliance Officers of the Department of Labor.

CONCLUSION

Accordingly, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit, and, after briefing and argument, that Judgment should be reversed.

Respectfully submitted,

ATCHLEY, RUSSELL, WALDROP
& HLAVINKA
803 Spruce Street —
P.O. Box 1049
Texarkana, Texas 75501

Charles J. Hlavinka

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of April, 1980, three true and correct copies of the above and foregoing Petition for Writ of Certiorari were placed in the United States mail, postage prepaid to Carin Ann Clauss, Solicitor of Labor, Ronald G. Whiting, Associate Solicitor, Paul E. Myerson, and Douglas J. Davidson, Counsel for Employment Standards, Room N2464 N. S. Department of Labor, 200 Constitution Avenue, N.W., General Legal Services, Washington, D.C. 20210.

Charles J. Hlavinka

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1979

No. 79-1362

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Appellant,

versus

Lane Processing, Inc.,
Appellee.

Filed: Jan. 4, 1980

APPEAL FROM the United States District Court for the Western District of Arkansas.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Western District of Arkansas and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now and here ordered and adjudged by this Court, that the judg-

ment of the said District Court, in this cause, be, and the same is hereby, reversed and the judgment of the District Court is vacated with directions to grant the injunctive relief.

December 5, 1979

A true copy. Attest:
/s/ ROBERT D. ST. VRAIN,
U.S. Court of Appeals, 8th Circuit.
January 2, 1980.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor

versus CA No. FS-76-117-C

LANE PROCESSING, INC.

Filed: March 13, 1979

ORDER

Pursuant to the Court's Memorandum Opinion filed herein this date and in accordance therewith,

IT IS ORDERED that no injunction should issue but that defendant Lane Processing, Inc. be, and it is here-

by, put on notice to take every reasonable precaution that it obey the Fair Labor Standards Act.

This the 13th day of March, 1979.

/s/ PAUL X. WILLIAMS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

(Number and Title Omitted)

Filed: March 13, 1979

MEMORANDUM OPINION

On June 28, 1976 the Secretary of Labor filed complaint against the defendant, Lane Processing, alleging violation of Fair Labor Standards Act of 1938 by employing oppressive child labor and seeking an injunction.

Defendant on July 26, 1976 filed answer in which it admits there were isolated unintentional violations and contends they were not oppressive and that no injunction should issue.

After discovery was complete, there was a trial to the Court on June 22, 1978 at which stipulations were filed, past violations were admitted by Lane and witnesses testified in person. Dean Speer, Bennett Wood, and William Howard Smith (all compliance officers) testified to past inspections and violations which were admitted by defendant.

Defendant offers evidence to the effect that Lane has built its business by hard work and great effort from a very small business to its present size — that Clift Lane and his wife, Dorothy, have worked diligently and that the past violations are in the main the employment of local children who needed the pay and children of adult employees who supervised their own children. Lane makes no effort to deny past violations, but contends that it is making a sincere effort to comply with all Government regulations including the Fair Labor Standards Act; that an injunction is not required and that an injunction would be a handicap and an unnecessary burden to have in its business.

The evidence clearly shows many technical violations. It also shows a bona fide effort on the part of Lane to remedy the situation. It also reveals that Mr. and Mrs. Clift Lane have built a large, profitable and tax paying business by industry and great personal endeavor. Their story is an inspiration to young Americans who desire to establish their own business and are willing to work.

At the conclusion of all evidence, the Court announced from the bench that the number of past violations seemed to indicate that an injunction should issue while on the other hand the lack of wilfull violations in recent years indicated that no injunction was required.

The plaintiff cites and relies on the following cases: *Brennan* v. *Correa, Jr., dba Ricardo's Mexican Enterprises of Ohana*, 76 Labor Cases ¶ 33,230 (8th Cir. 1975); *Goldberg* v. *Kickapoo Prairie Broadcasting Co.*, 288 F.2d 778 (8th Cir. 1961); *Lenroot* v. *Interstate Bakeries Corporation*, 146 F.2d 325 (8th Cir., 1945); *Shultz* v. *Salinas*, 416 F.2d 412 (5th Cir. 1969).

On the other hand Lane contends that the violations have ceased, are not likely to re-occur and, therefore, an injunction should not be entered.

43 CJS Sec. 25 contains the following language:

> "Injunctive relief will not lie to prevent that which in good faith has been discontinued, in the *absence of any evidence* that the acts are likely *to be repeated* in the future, and a suit for injunctive relief may be *moot if defendant can demonstrate* that there is no reasonable expectation that the wrong sought to be enjoined will be repeated. . . . as a prerequisite to injunctive relief, there must be a determination that there exists some cognizable danger of recurrent violation, something more than the mere

possibility which serves to keep the case alive." (emphasis added)

See also the following:

U.S. v. W. T. Grant Co., 345 U.S. 629.

In an earlier suit under the Fair Labor Standards Act, the government sought an injunction to stop violation of overtime and record-keeping provisions. Before trial, the defendant entered into a new contract with its workers and thereby ceased using its allegedly illegal mode of operation. The Supreme Court stated the general rule:

> "While voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial powers, . . . it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts." *Walling v. Youngerman-Reynolds Hardware Co., Inc.*, 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705 (Sup., 1945)

The Court held that no abuse of discretion by the trial court was shown in refusing to grant the injunction.

In a case arising in Arkansas, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1970) the issue concerned racial discrimination under Title VII of the Civil Rights Act of 1964. Southwestern Bell's conduct from 1965 to 1967 conclusively showed a violation of Title VII; however, in 1967 an effective policy was instituted in an attempt to comply with the act. The plaintiff brought action seeking relief individually and an injunction against the company's unlawful employment discrimination practices, before the new policy had been put into effect. On the question concerning the injunction, the Court said:

> "The Company's record over the past three years [under its new policy] is impressive and salutory. This court recognizes that the [defendant] has shown considerable progress under its affirmative action program adopted in 1968. The thrust of this program, in seeking minority group individuals for employment, tends to overcome the discrimination built into the previous recruitment system. The record also shows that the Company's management personnel have undertaken greater supervision and implementation of its employment policies and programs.
>
> In view of this evidence, we agree with the trial court that no injunction seems necessary or appropriate in this case at the present time." *Parham v. Southwestern Bell*, supra at page 429.

In another case in the U.S. District Court of Arkansas, Western District, the defendant had violated regulations by the Secretary of Army which concerned commercial boating operations on a government reservoir. On a summary judgment determination, the Court stated that affidavits of the defendant disclosed a good faith attempt to abide by the regulations in the future (the defendant admitted past violations), and that if such statements were true, then, when considered with the court's reluctance to grant injunctions against general violations of a statute or regulation, they may militate against the granting of an injunction unless it is shown that a reasonable likelihood exists that the defendant will revert to his former actions. *U.S. vs. Weaver*, 122 F.Supp. 577 (D.C. Ark., 1954).

"Injunction is an extraordinary remedy, . . . one which is reserved for really extraordinary cases." *43 C.J.S.* "INJUNCTIONS" §2.

In the case of *The Greater Iowa Corp. v. McLendon*, 378 F.2d 783, (8th Cir., 1967) involving an action by stockholders against the corporation for violation of the Security Exchange Act in regard to the issuance of preliminary injunction, the Court stated:

> "Injunctions are extraordinary legal remedies and are granted sparingly and under strict rules for the protection of all parties."

Again in *43 C.J.S.* "INJUNCTIONS" §15 at Page 777,

> "It has been said that there is no power the exercise of which is more delicate, requires greater caution and deliberation, or is more dangerous in a doubtful case, than the issuing of an injunction."

The Arkansas Supreme Court has expressed in several opinions its view on the nature of injunctive relief. The case of *Comer v. Woods*, 210 Ark. 351 (1946), concerned an action to enjoin the defendant from interfering with the plaintiff's possession of land. The Court quoted from *28 American Jurisprudence Page 199* §5:

> "Injunction is primarily a preventive remedy. Its province is to afford relief against future acts which are against equity and good conscience, and to keep or preserve a thing in status quo, rather than to punish for wrongful acts already committed. Generally speaking, rights already lost and wrongs already perpetrated cannot be corrected by injunction."

Not only does the Court look to the act to be enjoined, but also to the effect on the parties. *City of El Dorado v. McHenry*, 239 Ark. 232 (1965) where the City sued to enjoin owners of a building to stop obstructing the flow of water through a drain under the building. Citing *43 C.J.S. INJUNCTIONS §30 Page 462*, the Court stated,

"Ordinarily, on application for injunction the Court will in the exercise of the wide discretion with which it is vested take into consideration the relative inconvenience or injury which the parties will sustain by granting or refusal of the application for an injunction."

"That injunctive relief of a court of equity cannot be involved where there is an adequate remedy at law is so settled that the mere statement of the rule is sufficient." This fundamental was expressed by the Arkansas Supreme Court in 1931 in *Special School District No. 50 v. Deason*, 34 S.W.2d 1084. It would certainly appear that the civil penalty under 29 U.S.C. Sec. 216 would be an adequate remedy at law. According to 43 C.J.S. INJUNCTIONS §31a, the general rule is that no injunction will issue where the "remedy for any particular wrong or injury has been provided by statute." "Constitutional objections being eliminated, a court will not intervene merely to better such remedy which the legislature has deemed sufficient. . . ."

At the time of the trial, the Court indicated its curiosity as to precisely what harm would come to the Defendant by the issuance of an injunction in light of the fact that the Defendant in any case intends to comply with the act. Testimony was put on to the effect that the Defendant did much in the way of charity work, such as the building of rodeo arenas, hospitals, etc., and that the building of a public image enhanced

sales. The Defendant has enjoyed a long reputation of good standing within the community surrounding his plants, and as well within the poultry industry as a whole. Indeed evidence was offered tending to show that a former President of the United States, Gerald Ford, commended the Defendant for his employment of the young.

In addition to the harm to the image of this Defendant, one further matter needs to be considered by the Court. Granting an injunction could have an adverse effect on the ability of this Defendant to obtain loans.

The Court is aware that, in a business such as Lane, it is necessary in order to purchase grain, to build new facilities, etc., for Lane to borrow money periodically. On such occasions it is necessary that Lane furnish to the lending institutions a statement of financial condition. All such statements of financial condition reflect that claims and lawsuits are filed against or pending against the proposed borrower. If an injunction is granted against Lane, as a matter of accounting practice, it will appear on the financial statement that it is currently enjoined from engaging in any oppressive child labor practices." Such a notation could have a chilling effect and unnecessarily handicap Lane in its efforts to conduct business.

When all factors are considered, the Court finds that no injunction should issue at this time. This does not mean that all proof in this case has been forgotten, but

rather Lane will be put on notice that this opinion is a Caveat for Lane to take every reasonable precaution that it obey the Fair Labor Standards Act.

The Clerk will prepare order and embody the Caveat.

Dated this 13th day of March, 1979.

/s/ PAUL X. WILLIAMS
Paul X. Williams